IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.35 OF 2006
WITH
CIVIL APPLICATION NO.36 OF 2006

Jet Airways (India) Pvt.Ltd. ..Appellant.

V/s.

Mr.Cedric D'silva. ..Respondent.

Mr.C.U.Singh with Mrs.Vishakha Vaswani i/b V.V.Juris for appellant.

CORAM: A.M.KHANWILKAR,J

DATE : JULY 31, 2006.

P.C. :

1. Heard counsel for the appellant.

2. This appeal from order is taken up for final disposal today in terms of order dated February 10, 2006, issuing notice for final disposal.

3. This appeal from order takes exception to the Judgment and Order passed by the Bombay City Civil Court at Bombay dated September 13, 2005 in defendant's Notice of Motion No.690 of 2004 dated 13th February, 2004 in S.C.Suit No.3223 of 2003. By the impugned Judgment and Order, the Notice of Motion taken out by the appellant/defendant praying that the plaint filed by the respondent/plaintiff be rejected

in view of the provisions of Order 7 Rule 11(d) r/w in the alternate under Order 7 Rule 11(a) of C.P.Code, came to be dismissed. The suit filed by the respondent/plaintiff is purportedly seeking declaration that the action of the appellant/-defendant in not confirming the respondent/-plaintiff to the post of Operations Manager Western Region and reverting him to his earlier position as Senior Commander with effect from 17th August, 2002 being arbitrary, high handed, illegal, null and void and against the principles of natural justice. In the said suit which was filed on 7th July, 2003 Writ of Summons was issued on 22nd July, 2003. The appellant/defendant received the Writ of Summons on 22nd July, 2003. It is the case of the appellant/defendant that on receipt of the writ of summons, written statement was affirmed on 3rd October, 2003. When presented before the filing department of the lower Court, the department declined to accept the same and advised the appellant to present it at the hearing of the suit before the Judge concerned. The written statement accordingly, could be filed only on 13th January, 2004 in the court as on previous dates the Board before the concerned Judge was discharged. It is the case of the appellant that after filing of the written

statement on 13th January, 2004, the appellant/-defendant immediately affirmed the Affidavit in support of the Notice of Motion No.690 of 2004 to be filed by them, which was kept ready on 5th February, 2004. The Notice of Motion alongwith affidavit came to be filed by the appellant eventually on 12th February, 2004. Notice of Motion was heard and adjourned on several dates till it was finally disposed of by the impugned Judgment and Order passed on 13th September, 2005. The trial Court has essentially taken the view that the Notice of Motion filed by the appellant/defendant was filed after lapse of time from the institution of suit on 5th February, 2004. Besides, the appellant did not take steps for early hearing of the motion. The third reason recorded by the lower Court is that the plea taken by the appellants regarding bar of section 14 of the Specific relief act for institution of the suit can be considered at the time of deciding the suit.

4. In so far as first ground noted by the trial Court is concerned, regarding delay in filing of the Notice of Motion, I find substance in the stand taken on behalf of the appellant that in the first place the same is untenable. In any case, whether the

defendant filed Notice of Motion for the relief of rejection of plaint, it is the duty of the court to consider the requirement as to whether the suit as filed can proceed in law having regard to the provisions of Order 7 Rule 11. In my opinion, in the present case, the appellant cannot be blamed for institution of the Notice of Motion on 5th February, 2004. The circumstances, in which the same came to be filed on 12th February, 2004 has been explained from the record. The writ of summons was served on appellants on 22nd July, 2003. Thereafter, the appellants were required to first file written statement and as soon as written statement was allowed to be filed the appellants took out subject Notice of Motion which was kept ready on 5th February, 2004 but came to be filed only after seeking appropriate direction on 12th February, 2004. Viewed thus, it is not a case where the defendant has failed to raise objection at the earliest opportunity. In any case, it is the duty of the court to consider the requirement of Order 7 Rule 11 of the C.P.Code whether such plea is raised by the defendant or otherwise. This position is well established. The other ground which has weighed with the lower court is that the appellant did not insist early hearing of the said Motion. Even this reason

cannot be countenanced. The record indicates that Notice of Motion was adjourned on various dates for one reason or the other. The reason why the Notice of Motion could not proceed for final hearing cannot be the basis to decide the motion on merits and reject the motion on that count. If the issue raised in the Notice of Motion by the appellant went to the root of the matter, the fact that the appellant did not take steps to insist for early hearing of the motion would make no difference. The bounden duty of the court was to consider the issue of maintainability of the plaint as presented in the backdrop of provision of Order 7 rule 11 of the C.P.Code on its own merit, which is the established position in law. It is obvious from the reasons recorded in paragraph-7 of the impugned Judgment that argument regarding maintainability of the suit in the backdrop of section 14 of the Specific Relief act was specifically raised. Instead of answering that issue on merits the court has opined that it will be considered at the hearing of the suit. The lower Court instead ought to have answered the issue of Order 7 Rule 11 as raised by the appellant in the first instance before proceeding with the suit further.

5. Accordingly, the impugned Judgment and order cannot be sustained either on facts or in law. Hence this appeal is allowed. The impugned order is set aside. Instead the Notice of Motion No.690 of 2004 filed by the appellant is restored to the file of the trial Court for being decided afresh in accordance with the law on its own merits. Parties are relegated before the lower Court as in my view lower Court has not considered contention relating order 7 rule 11 on its own merits. That aspect will have to be dealt with in the first instance by the trial court so that this court will have the advantage of opinion of the trial court on the relevant contention.

6. Appeal as well as civil application disposed of the above terms. No order as to cost.

7. The trial Court shall decide the restored notice of motion as early as possible preferably by end of September, 2006. The parties to appear before the lower Court on 18th August, 2006 at 2.30 p.m. so that the trial Court can assign appropriate date for hearing of the Notice of Motion.